Supreme Court, U. S.
FILED
MAY 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1689

MAYFAIR CONSTRUCTION CORP.,

Petitioner,

-against-

FREDDIE BODRICK, ALLEN CORBETT, WILEY C. DUNBAR, JOSEPH T. DOBIE, MARION JAMES HOLLINS, HUBERT LAWTON, LARRY LYTTLE, MELVIN PLUMMA, WILLIE REYNOLDS, WILLIAM BAKER, FRANK BRISBANE, JAMES BRISBANE, SR., JAMES A. BRISBANE, JR., MARION CALDWELL, RODELL GRAHAM, JOSEPH N. GRAHAM, MANFORD GREGORY, JAMES HARRIS, MATTHEW HAZELTON, HEROD JONES, ROBERT E. LaROY, CHARLES LUTTREL, JR., WILLIE A. MARCHELL, SAMUEL MARSHALL, PAUL MILLER, CHARLES PEAY, LEO ROBINSON, NEAL WILLIAMS, and other employees of petitioner similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SAMUEL KIRSCHENBAUM
DREYER AND TRAUB
Counsel for Petitioner
90 Park Avenue
New York, N.Y. 10016

THOMAS CHARLES LAMBERT
Of Counsel

DICK BAILEY PRINTERS, 290 Richmond Ave., Staten Island, N.Y. 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

Page

Opinions below 2

Jurisdiction 2

Questions presented 2

Statutes, federal rules, and regulations involved 4

Statement of the case 5

Reasons for granting the writ 12

Conclusion 15

Appendix

Order of the trial court 1a

Decision of the trial court 4a

Opinion of the trial court 5a

Order of the Appellate Division 9a

Opinion of the Appellate Division 10a

Order of the Appellate Division granting leave to appeal to the Court of Appeals 11a

Majority memorandum opinion, dissenting opinions and order of the Court of Appeals 13a

1964 *Code of Federal Regulations*, Title 29, Part 5: "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction" 21a

CITATIONS

Cases:

	Page
Choy v. Farragut Gardens, Inc., 131 F.Supp. 609 (S.D.N.Y. 1955)	9,13,14
Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3d Cir. 1964)	9
Filardo v. Foley Bros., 297 N.Y. 217, 78 N.E.2d 480 (1948) *rev'd* 336 U.S. 281 (1949)	10,12,13
Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970)	9,14
Martinez v. Phillips Petroleum Co., 283 F.Supp. 514 (E.D. Idaho 1968) *aff'd* 424 F.2d 547 (9th Cir. 1970)	10,13
Perkins v. Lukens Steel Co., 310 U.S. 113 (1940)	9,13,14
United States v. Lovknit Mfg. Co., Inc., 189 F.2d 454 (5th Cir.) *cert. den.* 342 U.S. 896 (1951) *reh. den.* 342 U.S. 915 (1952)	8,13

Statutes and Regulations:

	Page
Administrative Procedures Act, 5 U.S.C. §§701, *et seq.*	7
Bacon-Davis Act, 40 U.S.C. §276a-2(b)	8
1964 Code of Federal Regulations, Title 29, Part 5	
29 CFR §5.1	5,21a
29 CFR §5.6(a)	5,22a
29 CFR §5.6(b)	5,6,22a
29 CFR §5.6(d)	5,6,23a
29 CFR §5.6(e)	5,6,23a
29 CFR §5.7	5,6,24a
29 CFR §5.8	5,25a
29 CFR §5.9	5,6,25a
29 CFR §5.10	5,26a
29 CFR §5.11	5,27a

Statutes and Regulations (cont'd)

	Page
Community Mental Health Centers Act, 42 U.S.C. §2685(a)(5)	12
Contract Work Hours Standards Act, 40 U.S.C. §328(b)(2)	8
Fair Labor Standards Act, 29 U.S.C. §216(b)	8
Federal Airport Act, 49 U.S.C. §1114	12
Federal Civil Defense Act of 1950, 50 U.S.C. Appx. §2281(h)	12
Federal Water Pollution Control Act, 33 U.S.C. §1372	12
Health Professions Educational Assistance Act of 1963, 42 U.S.C. §§292d(c)(4), 293a(c)(5)	12
Higher Educational Facilities Act of 1963, 20 U.S.C. §753	12
Hospital Survey and Construction Act, 42 U.S.C. §291e(a)(5)	12
Library Services and Construction Act, 20 U.S.C. §355	12
Mental Retardation Facilities Construction Act, 42 U.S.C. §§295a(a)(2)(D), 2662(a)(5), 2675(a)(5)	12
National Housing Act (12 U.S.C. §§1701, *et seq.*)	2,5,8,12,14
12 U.S.C. §1715b	3,5
12 U.S.C. §1715c(a)	2,4,5
12 U.S.C. §1715c(b)	3,5
Walsh-Healy Act, 41 U.S.C. §35	8,14

PETITION

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1975

MAYFAIR CONSTRUCTION CORP.,

Petitioner,

-against-

FREDDIE BODRICK, ALLEN CORBETT, WILEY C. DUNBAR, JOSEPH T. DOBIE, MARION JAMES HOLLINS, HUBERT LAWTON, LARRY LYTTLE, MELVIN PLUMMA, WILLIE REYNOLDS, WILLIAM BAKER, FRANK BRISBANE, JAMES BRISBANE, SR., JAMES A. BRISBANE, JR., MARION CALDWELL, RODELL GRAHAM, JOSEPH N. GRAHAM, MANFORD GREGORY, JAMES HARRIS, MATTHEW HAZELTON, HEROD JONES, ROBERT E. LaROY, CHARLES LUTTREL, JR., WILLIE A. MARCHELL, SAMUEL MARSHALL, PAUL MILLER, CHARLES PEAY, LEO ROBINSON, NEAL WILLIAMS, and other employees of petitioner similarly situated,

Respondents.

Petitioner prays that a writ of certiorari issue to review the final order of the Court of Appeals of the State of New York entered on February 26, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York in and for the County of New York is not officially reported and is printed in the Appendix hereto beginning at page 5a. The opinion of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department is reported at 44 A.D.2d 520, 353 N.Y.S.2d 158 and is printed in the Appendix hereto at page 10a. The majority memorandum opinion and dissenting opinions of the Court of Appeals of the State of New York are not yet reported and are printed in the Appendix hereto beginning at page 12a.

JURISDICTION

The order of the Court of Appeals of the State of New York was made and entered on February 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

The *National Housing Act* (12 U.S.C. §§1701 *et seq.*) provides, in part (in §1715c(a)), that the head of the federal administrative agency in charge of administering and enforcing the Act " . . . shall not insure . . . a mortgage . . . unless the principal contractor files a certificate . . . certifying that the laborers . . . employed in the construction . . . have been paid not less than the wages prevailing in the locality . . . as determined by the Secretary of Labor . . . .".

I.

The first question presented is:

Does the *National Housing Act* give to employees of a contractor whose mortgage is insured under the Act, a cause of action against the contractor which may be prosecuted in a private lawsuit in state court for the alleged difference between the wages paid to the employee pursuant to his employment contract with the contractor and the "wages prevailing in the locality . . . as determined by the Secretary of Labor . . . ."?

The holding of the New York Court of Appeals answered this question in the affirmative.

II.

The second question presented is:

Where, pursuant to its powers under the *National Housing Act* (12 U.S.C. §§1715b and 1715c(b)) and regulations thereunder (29 C.F.R. Part 5), the Federal Housing Administration (now the Department of Housing and Urban Development), prompted by employee complaint, has made an investigation, including review of the employer's payroll, and has made a determination and award of restitution to the employees of the difference between what they were paid and the "prevailing wages" under the Act, which award has admittedly been complied with and paid to the employees, does a state court have jurisdiction thereafter to entertain the same complaint (for the alleged difference between the wages they were paid and "prevailing wages") where the employees, who had counsel throughout, (1) made no objection to the administrative determination and award, (2) made no at-

tempt to obtain a further administrative remedy, (3) made no attempt to appeal or obtain review of the administrative determination and award and (4) brought no proceeding in the nature of mandamus?

The holding of the New York Court of Appeals answered this question in the affirmative.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

National Housing Act 12 U.S.C. §1715c(a) (1964) reads as follows:

> The Commissioner shall not insure under section 1713 or 1715a or 1743 of this title, pursuant to any application for insurance filed subsequent to the effective date of this section, or under section 1715e of this title, or under subchapter VII of this chapter pursuant to any application filed subsequent to sixty days after April 20, 1950, or under section 1748b or 1748h-2 or subchapter VIII of this chapter, or under section 1750g of this title, a mortgage or investment which covers property on which there is or is to be located a dwelling or dwellings, or a housing project, the construction of which was or is to be commenced subsequent to such date, unless the principal contractor files a certificate or certificates (at such times, in course of construction or otherwise, as the Commissioner may prescribe) certifying that the laborers and mechanics employed in the construction of the dwelling or dwellings or the housing project involved have been paid not less than the wages prevailing in the locality in which the work was performed for the corresponding classes of laborers and mechanics employed on construction of a similar character, as determined by the Secretary

> of Labor prior to the beginning of construction and after the date of the filing of the application for insurance.

1964 *Code of Federal Regulations* Title 29, Part 5, §§5.1, 5.6(a), 5.6(b), 5.6(d), 5.6(e), 5.7, 5.8, 5.9, 5.10 and 5.11 appear in the Appendix hereto beginning at page 20a.

STATEMENT OF THE CASE

At various times between August 29, 1962 and May 6, 1964, each of the respondents was employed by the petitioner to work on a construction project in Manhattan with respect to which the petitioner-employer had obtained a mortgage loan which was insured by the Federal Housing Administration (now the Department of Housing and Urban Development) pursuant to the provisions of the *National Housing Act*, 12 U.S.C. §1701 *et seq.* Through their attorney the respondents-employees complained to the Federal Housing Administration that they had not been paid the "prevailing wages" which they claimed were required by *National Housing Act*, 12 U.S.C. §1715c(a), which reads in relevant part as follows:

> The Commissioner [now the Secretary of Housing and Urban Development] shall not insure . . . a mortgage . . . unless the principal contractor files a certificate . . . certifying that the laborers . . . employed in the construction . . . have been paid not less than the wages prevailing in the locality . . . as determined by the Secretary of Labor . . . .

Under the regulations promulgated by the Secretary of Labor pursuant to *National Housing Act* 12 U.S.C. §§1715c(b) and 1715b, the federal administrative agency is required to ". . . make such examination of the certified

payrolls and statements as may be necessary to assure compliance with the labor standards . . . .". 29 C.F.R. §5.6(d). The regulations further provide, 29 C.F.R. §5.6(e),:

> In addition to the examination of payrolls and statements required by paragraph (d) of this section, the Federal agency shall cause investigations to be made as may be necessary to assure compliance with the labor standards . . . .Such investigations shall include interviews with employees and examinations of payroll data to determine the correctness of classifications and disproportionate employment of laborers, helpers or apprentices. Complaints of alleged violations shall be given priority and statements, written or oral, made by an employee shall be treated as confidential and shall not be disclosed to his employer without the consent of the employee.

Among the powers of enforcement given to the federal agency, including contract termination (29 C.F.R. §§5.7(a) and 5.7(d)), three-year ineligibility (29 C.F.R. §5.6(b)), blacklisting (29 C.F.R. §5.6(b)), criminal prosecution (29 C.F.R. §5.9(b)) and others, the regulations provide (29 C.F.R. §5.9(a)) that:

> The Agency Head may, in appropriate cases where violations of . . . the applicable statutes listed in §5.1 resulting in underpayment of wages to employees are found to be nonwilful, order that restitution be made to such employees.

Pursuant to its powers and duties, the Federal Housing Administration conducted an investigation which included interviews and a review of petitioner's payroll records and the Administration determined that none of the plaintiffs

had been paid the appropriate prevailing wage. As a result the Commissioner of the Administration ordered that appropriate restitution be made to the employees. It is conceded that these payments were made by petitioner's certified checks which, in accordance with Administration procedure, were sent to the Administration, which in turn mailed the checks to the individual employees together with a letter of transmittal. These form letters of transmittal read as follows:

> Enclosed is a check in the amount of drawn payable to you by your employer at the above named project. The sum represents a reimbursement to you of wages inasmuch as payroll records prepared by your employer indicated that you were paid at an hourly rate less than the rate established for this project by the Secretary of Labor.
>
> This Administration has been in charge of the examination of payroll records for this project and has determined that the check in the amount stated is proper compensation for your work.

All of these checks were accepted and promptly cashed and in some but not all instances there appeared on the reverse side of the checks the following endorsement:

> The undersigned acknowledges and agrees that the acceptance of this check constitutes payment in full and a complete and general release of all claims against [petitioner].

Neither the respondents nor their attorney made any objection to this determination and award; they made no attempt to obtain a further administrative remedy; and they made no attempt to appeal or obtain review of the administrative determination and award pursuant to the *Administrative Procedures Act* 5 U.S.C. §§701 *et seq.*

Less than one week after these checks were sent out, the

respondents commenced this action against the petitioner in state court for the alleged difference between the wages they were paid and the "wages prevailing in the locality . . . as determined by the Secretary of Labor" basing their cause of action upon the above-quoted provision of the *National Housing Act.*

After answering the complaint and asserting the affirmative defenses of payment and release, petitioner made a motion for an order dismissing the aforesaid alleged cause of action upon the grounds, *inter alia,* that the court did not have subject matter jurisdiction and that the allegations failed to state a cause of action.

The trial court granted petitioner's motion and dismissed the alleged cause of action. The court's decision was justified upon the following:

1. No right of private suit is expressly provided in either the *National Housing Act* or the regulations promulgated thereunder. The regulations do expressly provide for other remedies and sanctions.

2. When Congress intended to provide employees with a right of private suit against their employer, Congress said so expressly as in the *Fair Labor Standards Act* (29 U.S.C. §216(b)) the *Bacon-Davis Act* (40 U.S.C. §276a-2(b)) and the *Contract Work Hours Standards Act* (formerly known as the *Eight-Hour Law*) (40 U.S.C. §328(b)(2)).

3. The *Walsh-Healy Act* (41 U.S.C. §35) is similar to the *National Housing Act* in that it provides that contracts with the United States for the manufacture of goods must contain a requirement that the contractor pay prevailing wages as determined by the Secretary of Labor. In the case of *United States v. Lovknit Mfg. Co., Inc.,* 189 F.2d 454 (5th Cir.) *cert. den.* 342 U.S. 896

(1951) *reh. den.* 342 U.S. 915 (1952), the Court held that employees have no right of private suit against their employer under the Act. The Court in *Lovknit* relied in part on *Perkins v. Lukens Steel Co.*, 310 U.S. 113 at 128 where the Supreme Court stated that the Walsh-Healy Act ". . . does not represent an exercise by Congress of regulatory power over private business or employment. . . . Congress did no more than instruct its agents . . . to fix the terms and conditions under which the Government will permit goods to be sold to it."

4. *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3 (3d Cir. 1964) held that an employee may not sue his employer for damages sustained by reason of the employer's violation of the non-discrimination provision inserted by law into the employer's contract with the Government because, while the regulations do provide some remedies for violation, private court action by the employee is not among them.

5. *Choy v. Farragut Gardens, Inc.*, 131 F.Supp. 609 (S.D.N.Y. 1955) construed the National Housing Act as not providing a right of private suit by tenants against their landlord for violation by the landlord (who received assistance under the Act) of provisions of the Act relating to the determination by the Federal Housing Commissioner of the maximum chargeable rent. The court said ". . . there is nothing in Title VI of the National Housing Act, its purpose or history, which suggests that under the circumstances here presented the plaintiffs . . . were given a legal right to have the courts review and supervise the administrative function entrusted by the Congress to the Commissioner's judgment or discretion." In *Hahn v. Gottlieb,* 430 F.2d 1243 (1st Cir. 1970) the court also precluded judicial interference with the

administration of the National Housing Act.

6. The case of *Filardo v. Foley Bros.*, 297 N.Y. 217, 78 N.E.2d 480 (1948) *rev'd* 336 U.S. 281 (1949) involved construction of the old federal Eight-Hour Law which provided that overtime work by laborers on Government jobs was to be permitted upon compensation at not less than one and one-half times the employee's basic rate of pay. The New York Court of Appeals held that there was implied in this statute a right of private suit by the employee against his employer for the appropriate overtime wage. The U.S. Supreme Court reversed the Court of Appeals on other grounds stating expressly, 336 U.S. at 291, that in view of its decision on other grounds, it was unnecessary to decide the question of implied right of private suit. Thereafter the federal court in *Martinez v. Phillips Petroleum Co.*, 283 F. Supp. 514 (E.D. Idaho 1968) *aff'd* 424 F.2d 547 (9th Cir. 1970) held that the old Eight-Hour Law did *not* imply a right of private suit by the employee against his employer. The trial court in the instant case distinguished the holding of the Court of Appeals in *Filardo* that there can be no right without a remedy on the grounds that in this case there obviously was another remedy, namely restitution awarded by the Federal Housing Administration.

On Appeal to the Appellate Division, First Department, however, the New York intermediate appellate court reversed, basing its decision on the *Filardo* case, stating that ". . . its principle has not been discredited by the Federal courts" notwithstanding the fact that the *Martinez* case, *supra*, held directly *contra Filardo*.

Petitioner then moved the Appellate Division for leave to appeal to the New York Court of Appeals on the grounds that ". . . it would be beyond candid appraisal of the law to

deny that the question presented upon the appeal was a novel question involving law which has not been uniformly settled and involving an issue the determination of which is essentially important to an understanding by our citizenry of the application and interpretation of [certain] federal statutes." The Appellate Division granted petitioner's motion and certified to the Court of Appeals the question of whether the cause of action pleaded in the complaint was "dismissible as a matter of law."

On appeal to the Court of Appeals, five of the seven Judges affirmed the Appellate Division decision and answered the certified question in the negative stating in a two-sentence memorandum that the remedies prescribed in the regulations were not exclusive and that therefore ". . . aggrieved employees were empowered to enforce, by private litigation, the benefits afforded them under the National Housing Act. . . ."

In a lengthy dissenting opinion Judge Jason voted to reverse the Appellate Division decision and dismiss the cause of action because of lack of the necessary subject matter jurisdiction, stating:

> Since the prosecution of the lawsuit would necessarily call into question the correctness of the FHA Commissioner's 1964 determination, made under the authority of federal statute and regulation, our state courts are not empowered to review such authorized federal determinations.

Judge Jason found it therefore "unnecessary to decide whether aggrieved employees who had neither sought nor received a FHA determination would be entitled to maintain a private action by an extension of the Court's rationale in *Filardo v. Foley Bros.*" Chief Judge Breitel concurred with Judge Jason's dissent and added that the respondents are estopped by their failure to exhaust their federal administrative remedies.

REASONS FOR GRANTING THE WRIT

The *National Housing Act* is by no means the only statute of the United States under which the granting of federal aid or assistance is conditioned upon compliance by the recipient with a requirement that the recipient assure, or certify to, the Government that those who work for him are paid "not less than the wages prevailing in the locality . . . as determined by the Secretary of Labor." Other such statutes, which are almost identical in language, presently include the *Federal Water Pollution Control Act*, 33 U.S.C. §1372, *Library Services and Construction Act*, 20 U.S.C. §355, *Higher Educational Facilities Act of 1963*, 20 U.S.C. §753, *Community Mental Health Centers Act*, 42 U.S.C. §2685(a)(5), *Mental Retardation Facilities Construction Act*, 42 U.S.C. §§295a(a)(2)(D), 2662(a)(5), 2675(a)(5), *Health Professions Educational Assistance Act of 1963*, 42 U.S.C. §§292d(c)(4), 293a(c)(5), *Federal Civil Defense Act of 1950*, 50 U.S.C. Appx. §2281(h), *Federal Airport Act*, 49 U.S.C. §1114, *Hospital Survey and Construction Act*, 42 U.S.C. 291e(a)(5), and these are only a fraction of the list.

Resolution by this Court of the first question presented will therefore affect the rights not only of the multitudinous number of recipients of assistance under the *National Housing Act* and their employees but also the even greater number of recipients of aid and assistance (and their employees) under many other federal statutes.

The first question presented has not been resolved by the United States Supreme Court. However, the Court has previously expressed its awareness of the importance of the question by granting certiorari in the *Filardo* case discussed, *supra*, at page 10, item 6. The Court granted

certiorari but, upon review, was compelled to decide the case on an unrelated question. Supreme Court review of the question is no less appropriate in this case.

An examination of a U.S. Supreme Court case which does have a bearing on the question presented indicates that the New York Court of Appeals has decided this case in a way which is probably not in accord with such relevant Supreme Court decision. See the discussion of the *Perkins* case at page 8, item 3, *supra*, and page 14, *infra*.

Furthermore, the holding by the New York Court of Appeals in this case contravenes the federal court decisions in the *Lovknit*, *Choy* and *Martinez* cases which last case expressly rejected the New York Court of Appeals *Filardo* case holding upon which the New York appellate courts have placed such great reliance in the instant case. See the discussion of these cases *supra*, at pages 8-10, items 3, 5 and 6. There is a serious conflict between state and federal court decisions on the question.

The second question presented by this case is equally important because the present holding effectively permits state courts to entertain *nisi prius* the same factual issues as were previously determined by a federal administrative agency expressly given jurisdiction over the issues by Congress. It will permit inconsistent determinations of the same complaint by a federal agency on the one hand and a state court on the other, notwithstanding that the state courts have not been given appellate jurisdiction, that the aggrieved employee has not exhausted his administrative remedy and that he has not sought review of the administrative determination.

The guidance of the U.S. Supreme Court on this important second question is necessary to resolve the serious conflict of authority which has arisen.

The New York Court of Appeals, declaring the law for its state, has held that where the administrative remedy is not expressly stated to be "exclusive", the employee can bring the same complaint in the first instance to the courts or the administrative agency *or both.*

This does not appear to be in accord with either federal authority precluding judicial interference with the administration of the *National Housing Act* (see the *Choy* and *Hahn* cases discussed, *supra,* at page 9, item 5) or the pronouncements of the U.S. Supreme Court with respect to the *Walsh-Healy Act* in *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127, 131 (1940) as follows:

> Thus, a wage determination by the Secretary contemplates no controversy between parties and no fixing of private rights; the process of arriving at a wage determination contains no semblance of these elements which go to make up a litigable controversy as our law knows the concept. Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties "require an interpretation of the law." Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government. [Footnotes omitted.]
>
> * * *
>
> If the general law permits prospective bidders to challenge each wage determination of the Secretary in the courts, by a like token all employees affected could obtain judicial review. Such a possibility places in bold relief those conditions which led Congress to proceed in this Act upon the belief, to which we have recently alluded, that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

> The case before us makes it fitting to remember that "The interference of the Courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." [Footnotes omitted.]

Involving, as it does, a question of the marking of the boundaries of permissible judicial inquiry into administrative and executive responsibilities as well as a question of the existence of a significant right under a federal statute typical of many others, it is respectfully submitted that this case is a peculiarly appropriate one for the exercise of the U.S. Supreme Court's jurisdiction to review.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SAMUEL KIRSCHENBAUM
DREYER AND TRAUB
Counsel for Petitioner
90 Park Avenue
New York, N.Y. 10016

Thomas Charles Lambert
Of Counsel

Appendix

ORDER OF THE TRIAL COURT

At a Trial Term, Part VI, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at Foley Square, Borough of Manhattan, City and State of New York, on the 1st day of March, 1972.

PRESENT:
Hon. Morris E. Spector,
Justice

FREDDIE BODRICK, ALLEN CORBETT, WILEY C. DUNBAR, JOSEPH T. DOBIE, MARION JAMES HOLLINS, HUBERT LAWTON, LARRY LYTTLE, MELVIN PLUMMA, WILLIE REYNOLDS, WILLIAM BAKER, FRANK BRISBANE, JR., MARION CALDWELL, RODELL GRAHAM, JOSEPH N. GRAHAM, MANFORD GREGORY, JAMES HARRIS, MATTHEW HAZELTON, HEROD JONES, ROBERT E. LaROY, CHARLES LUTTREL, JR., WILLIE A. MARCHELL, SAMUEL MARSHALL, PAUL MILLER, CHARLES PEAY, LEO ROBINSON, NEAL WILLIAMS, and other employees of defendant similarly situated,

Plaintiffs,

-against-

MAYFAIR CONSTRUCTION CORP.,

Defendant.

Defendant, having moved this Court for an order dismissing both causes of action of the complaint on the following grounds: (a) Under Section 3211 (a)(2) of the CPLR in that the Court does not have jurisdiction of the subject matter; (b) 3211 (a) (5) collateral estoppel; (c) 3211 (a) (7) that it fails to state a cause of action; and (d) for summary judgment under §3211 of the CPLR: and the said motion having duly come on before me to be heard;

NOW, upon reading and filing of defendant's notice of motion dated December 27, 1971 together with the affidavit of Leonard Litwin duly sworn to December 23, 1971, the affirmation of Manuel Taxel, Esq. dated December 23, 1971, with the pleadings and exhibits annexed thereto submitted in support of said defendant's motion and on the affidavit of Samuel Panzer, Esq. sworn to January 24, 1972, with exhibits annexed thereto in opposition to said defendant's motion and upon all the pleadings and proceedings heretofore had herein and the defendant having appeared by Dreyer and Traub, Manuel Taxel, Esq., of counsel, and Milton Horowitz, Esq., of counsel to Samuel Panzer, having appeared as attorney for the plaintiffs herein, and due deliberation having been had thereon and the Court having filed its decision,

NOW, on motion of Dreyer and Traub, attorneys for defendant, it is hereby

ORDERED that the defendant's motion to dismiss the first cause of action set forth in the complaint which alleges a claim for prevailing wages pursuant to 12 U.S.C. §1715C of the National Housing Act with respect to each of the plaintiffs be and the same is hereby granted and said cause of action with respect to each of the said plaintiffs be and the same hereby is dismissed; and it is further

ORDERED that defendant's motion to dismiss the

second cause of action set forth in the complaint for overtime compensation pursuant to the Fair Labor Standards Act 29 U.S.C. §201 to 219 with respect to each of the plaintiffs is hereby denied.

ENTER

M.E.S.
J.S.C.

Filed
March 2, 1972
New York
Co. Clerk's Office

DECISION OF THE TRIAL COURT

TRIAL TERM PART VI

Present:
Hon. Morris E. Spector
Justice.

(SAME TITLE)

Notice of Motion and Affidavits Annexed, papers numbered 1-14.

Answering Affidavits, papers numbered 15-17.

Upon the foregoing papers this motion is decided in accordance with accompanying memorandum decision.

Filed
March 2, 1972
New York
Co. Clerk's Office

Dated February 14, 1972

M.E.S.
J.S.C.

Briefs: Plaintiff's X Defendant's X 2

OPINION OF THE TRIAL COURT

(SAME TITLE)

SPECTOR, J.:

Defendant moves for dismissal of the first cause of action on the ground that plaintiffs did not have a right to bring private suit and this Court therefore does not have jurisdiction of the subject matter (CPLR 3211(a)(2); for dismissal of the second cause of action on the defense of collateral estoppel (CPLR 3211 (a)(5); for dismissal of the complaint for failure to state a cause of action (CPLR 3211 (a)(7); and for summary judgment.

Plaintiffs are a group of non-union employees who worked for defendant at varying times between August 29, 1962 and May 6, 1964 on the construction of three apartment houses in Manhattan, which were financed under the National Housing Act by an F.H.A. insured building loan. The terms of the Federal assistance required that prevailing wages, as set by the Secretary of Labor of the United States, be paid to mechanics and laborers (12 USC 1715c). The lowest prevailing wage at the time in this locality for a "laborer" was $3.95 per hour. Plaintiffs claim they were paid $2.00 to a maximum of $2.25 per hour, without time-and-one-half for overtime above 44 hours, as they allege is required by the Fair Labor Standards Act. They are suing on their first cause of action for the difference between the wages they received and what they allege they should have been paid for straight time work, and on their second cause of action for unpaid overtime.

After termination of plaintiffs' employment, the Federal Housing Administration reviewed defendant's payroll and

made an adjustment with respect to plaintiffs' wages. Defendant paid each the sum awarded by FHA by check which was transmitted in each case by a covering letter from FHA stating, "This Administration has been in charge of the examination of payroll records for this project and has determined that the check in the amount stated is proper compensation for your work". Each of the plaintiffs accepted this payment, although the summons in this action had been served at that time.

The administration and enforcement by Federal agencies of labor standards provisions applicable to construction contracts which are financed or assisted by Federal money is defined in Title 29, Subtitle A, of the Code of Federal Regulations under Reorganization Plan No. 14 of 1950. The purpose of the Plan was to achieve consistency of enforcement under all the numerous statutes which provide for labor standards. The Regulation has from time to time been amended. We are here concerned with the enforcement provisions of the Regulation at the time of plaintiffs' employment.

Prior to the amendment of Reorganization Plan 14 on September 30, 1964 (Title 29, Subtitle A, Code of Federal Regulations) the enforcement of the National Housing Act did not provide for a right of private suit by aggrieved employees. The penalty to the employer for violation of the wage payment provisions was suspension of payments [Title 29, Subtitle A, sec. 5.5(a)(2) and sec. 5.8] and ineligibility for three years to receive any other contract subject to the Federal laws set forth in sec. 5.1 of Title 29 [sec. 5.6(b)]. The Davis-Bacon Act (40 USC 276a) was specifically excluded from these enforcement provisions, reference being made to the enforcement provisions in Davis-Bacon itself.

The aggrieved employees' rights at that time were by complaint to the administrative agency [sec. 5.6(e)] and either an order of restitution of wages by the "Agency Head" if the violation were found to be non-wilful [sec. 5.9(a)] or by prosecution of the wilful violator by the Attorney General of the United States [sec. 5.9(b)]. In this case it is not clear whether the review of defendant's payroll by FHA which resulted in the additional payments to plaintiffs was the result of employee complaints or not, but it is clear that none of the plaintiffs availed themselves of an administrative remedy if they were dissatisfied with their wage adjustment.

Plaintiffs place great reliance upon Filardo v. Foley, 297 N.Y. 217, which permitted the plaintiff to recover overtime pay for work performed as a cook on a construction project in Iran during World War II. The United States Supreme Court reversed in 336 U.S. 281, only on the basis of the extraterritorially feature of the case, deliberately avoiding the question of whether or not plaintiff had the right to a private cause of action at the time. However, the case is inapplicable here, because the Davis-Bacon Act (40 USC 276a) and *not* the National Housing Act (12 USC 1715c) covered Filardo's situation. Davis-Bacon covers construction contracts where the United States is itself a party. Under the National Housing Act, the United States is a loan guarantor and the contracting parties are private individuals and institutions. Historically, the United States has legislated on labor standards with respect to its own contracts since the first Eight Hour Law in 1868, whereas regulatory legislation on working conditions in the private sector of the economy came much later, such as the Fair Labor Standards Act of 1939. Nor is the holding in *Filardo* that where there is a wrong there must be a remedy necessarily a ruling that the remedy must be in the form of

a right of the individual employee to sue. While the National Housing Act was amended in September, 1964-too late to affect these plaintiffs—so as to include the provisions of Bacon-Davis permitting private suits, the Walsh-Healy Act (41 USC 35-45), which deals with goods manufactured for use by United States Government Agencies, *still* does not permit private suits. (Willis v. E.I. DuPont, 76 F. Supp. 1010.)

There came a time, in September, 1964, when Congress decided that the individual aggrieved employee on a construction project financed with government assistance should have the right to sue his employer for the underpayment of wages as determined by the Secretary of Labor. We must recognize that before that time there was no such right to sue, or we would be declaring the 1964 amendment to the statute unnecessary. There is no indication that the additional payments made to plaintiffs after FHA audit or payroll covered overtime. The right of individual suit did exist under the Fair Labor Standards Act. (29 USC 201-219).

As to the second causes of action under the Fair Labor Standards Act for overtime pay, a question of fact exists as to whether the law applies. The criteria as to the gross annual amount of business of defendant, and whether it is or is not in interstate commerce, are matters for proof upon a trial.

Defendant's motion for dismissal of the first causes of action is granted, and denied for the second causes of action.

Settle order.

Dated: February 14, 1972.

M.E.S.
J.S.C.

ORDER OF THE APPELLATE DIVISION

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 12, 1974

Present Hon. Arthur Markewich Justice Presiding
Hon. Aron Steuer
Hon. George Tilzer
Hon. Myles J. Lane
Hon. J. Robert Lynch Justices

(SAME TITLE)

An appeal having been taken to this Court by the Plaintiffs-appellants from so much of an order of the Supreme Court, New York County (Spector, J.), entered on March 2, 1972, as granted defendant's motion to dismiss the first cause of action of the complaint which alleged a claim for prevailing wages pursuant to 12 U.S.C. Section 1715C of the National Housing Act with respect to each plaintiff, and said appeal having been argued by Mr. Milton Horowitz of counsel for the appellant and by Mr. Thomas C. Lambert of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so far as appealed from be and the same is hereby reversed, on the law, and defendant's motion to dismiss the first cause of action denied. Appellants shall recover of respondent $60 costs and disbursements of this appeal.

ENTER: Hyman W. Gamso
Clerk

OPINION OF THE APPELLATE DIVISION

(SAME TITLE)

Order, Supreme Court, New York County (Spector, J.) entered on March 2, 1972, so far as appealed from, unanimously reversed, on the law, and defendant's motion to dismiss the first cause of action denied. Appellants shall recover of respondent $60 costs and disbursements of this appeal.

Plaintiffs, laborers on a construction project, sue in their first cause of action to recover the difference between the prevailing rate of wage and the amounts paid to them. Special Term dismissed this cause of action on the ground that the National Housing Act (12 U.S.C. Section 1715(c)) gives no private right of action. While it is quite correct that the statute contains no specific grant of such a right, this is not conclusive. The United States courts have often found an implied right of private suit by a person aggrieved where the statute did not specifically so provide (United States v. Post, 148 U.S. 124; J. J. Case Co. v. Borak, 377 U.S. 426; Jordan Building Corp. v. Doyle O'Connor & Co., 401 F 2d 47; Fischman v. Raytheon Mfg. Co., 188 F 2d 783). Interpreting a similar statute our Court of Appeals held that denial of a right of private suit would be the grant of a right without a remedy, and held the grant implied (Filardo v. Foley Bros., 297 N.Y. 217). Though this case was reversed on other grounds (336 U.S. 281), its principle has not been discredited by the Federal courts.

Order filed.

ORDER OF THE APPELLATE DIVISION GRANTING LEAVE TO APPEAL TO THE COURT OF APPEALS

(SAME TITLE)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 16, 1974

Present:
Hon. Arthur Markewich, Justice Presiding
Hon. Aron Stuer
Hon. George Tilzer
Hon. Myles J. Lane
Hon. J. Robert Lynch Justices

The above-named defendant-respondent having moved for leave to appeal to the Court of Appeals from the order of this Court entered on March 12, 1974,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit and the statement of Thomas C. Lambert in support of said motion, and the statement of Milton Horowitz in opposition thereto, and after hearing Mr. Thomas C. Lambert for the motion and Mr. Milton Horowitz opposed.

It is ordered that said motion be and the same hereby is granted and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

"Is the First Cause of Action pleaded in the Complaint dismissable as a matter of law?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:
Hyman W. Gamso
Clerk

MAJORITY MEMORANDUM OPINION, DISSENTING OPINIONS AND ORDER OF THE COURT OF APPEALS

(SAME TITLE)

MEMORANDUM:

The order of the Appellate Division should be affirmed and the certified question answered in the negative.

The regulations of subtitle A of title 29 of the Code of Federal Regulations, as adopted by the United States Secretary of Labor and existing during the period in question, evidenced a design and charting of course for the conduct of investigations and hearings in prevailing wage disputes only as the Secretary, in his discretion, deemed appropriate or desirable (see, e.g. 29 CFR, subtit. A, §5.10). There being no exclusive administrative remedy prescribed therein, the aggrieved employees were empowered to enforce by private litigation, the benefits afforded them under the National Housing Act, as set forth in section 1701 *et seq.* of title 12 of the United States Code (cf. *Filardo v. Foley Bros.*, 297 NY 217, revd on other grounds, 336 US 281), even though the regulations, made pursuant to statute, did not explicitly authorize a civil remedy (cf. *J.I. Case Co. v. Borak*, 377 US 426, 432; *Texas & Pacific Ry. v. Rigsby*, 241 US 33, 39; *Jordan Bldg. Corp. v. Doyle, O'Connor & Co.*, 401 F2d 47, 49-50; *Fischman v. Raytheon Mfg. Co.*, 188 F2d 783, 787).

JASEN, J. (dissenting):

I dissent and vote to reverse the order of the Appellate Division and dismiss the first cause of action on the ground that the courts of this state lack the necessary subject matter jurisdiction and may not, therefore, entertain the action.

Plaintiffs are non-union laborers and mechanics who were employed by defendant Mayfair Construction Corp. at various times between August 29, 1962 and May 6, 1964. They had been hired to work on certain construction projects in Manhattan which were financed under the National Housing Act by a building loan insured by the Federal Housing Administration (hereinafter "FHA"). Their complaint in this action alleged two causes of action; only the first of those causes is before us on this appeal. This cause of action is bottomed on the Federal statutory provision which requires that laborers and mechanics employed on construction projects involving federal loan insurance be paid not less than the wages prevailing in the locality for the corresponding classes of laborers and mechanics, as determined by the Secretary of Labor. (U.S. Code, tit. 12, §1715c, subd [a]). Plaintiffs allege that they were paid less than the applicable prevailing wage, and seek to recover the difference.

The relevant factual background of this controversy is set out in neither the Appellate Division opinion, nor the memorandum of this court in which a majority of my colleagues concur. In early 1964, the FHA reviewed Mayfair's payroll and determined that none of the plaintiffs had been paid the appropriate prevailing wage. Plaintiffs concede that this review was made after some of them had made complaints to FHA representatives. As a result of this investigation, the Commissioner ordered that

appropriate restitution be made to the employees. These payments were made by Mayfair's checks dated May 5, 1964, which, in accordance with FHA procedure, were sent to the FHA, which in turn mailed the checks to the individual employees, together with a letter of transmittal. These form letters read as follows:

> "Enclosed is a check in the amount of
> drawn payable to you by your employer at the above named project. The sum represents a reimbursement to you of wages inasmuch as payroll records prepared by your employer indicated that you were paid at an hourly rate less than the rate established for this project by the Secretary of Labor.
>
> This Administration has been in charge of the examination of payroll records for this project and has determined that the check in the amount stated is proper compensation for your work."

All of these checks were promptly cashed. Thereafter, for reasons not explained in the record, nine of the plaintiffs received additional checks, dated August 24, 1964, accompanied by the same FHA form letter of transmittal. However, on the reverse side of each of these checks, the following endorsement was printed: "The undersigned acknowledges and agrees that the acceptance of this check constitutes payment in full and a complete and general release of all claims against Mayfair Construction Corp." These checks likewise were accepted and cashed promptly.

Under regulations promulgated by the Secretary of Labor, "[t]he Agency Head may, in appropriate cases where violations of *** the applicable statutes listed in §5.1 resulting in underpayment of wages to employees are found to be nonwillful, order that restitution be made to such

employees" (29 CFR § 5.10[a], 29 Fed. Reg. 103 [1964]). Those regulations list the National Housing Act as one of the statutes to which this regulation applies (29 CFR § 5.1[a], 29 Fed. Reg. 99 [1964]). Thus, the FHA Commissioner was clearly empowered to act as he did here. Indeed, plaintiffs do not contend otherwise.

Not fully satisfied with this determination by the FHA, the plaintiffs commenced this action on May 11, 1964, less than one week after the first set of checks were sent out. After answering the complaint and asserting certain affirmative defenses, Mayfair moved for an order dismissing the complaint upon the grounds, *inter alia,* that the court did not have subject matter jurisdiction and that the complaint failed to state a cause of action. (CPLR 3211, subd [a], pars 2 and 7.) Supreme Court granted this motion only as to the first cause of action. Its rationale was that the National Housing Act did not give aggrieved employees the right to maintain a private action. The Appellate Division reversed, on the law, and denied defendant's motion to dismiss the first cause of action. It reasoned that the right of aggrieved employees to maintain a private suit was implied, relying on *Filardo v. Foley Bros.* (297 NY 217, revd on other grounds 336 US 281). That same court granted Mayfair's motion for leave to appeal, certifying for our review the following question: "Is the First Cause of Action pleaded in the Complaint dismissable as a matter of law?"

The courts of this state have long recognized the rule that our state courts have no power to revise or review official acts performed by Federal officials acting under authority of acts of Congress and regulations promulgated under such laws. For example, *Matter of Schmoll, Inc. v. Federal Reserve Bank of New York* (286 NY 503) was a case in

which an importer claimed that the Federal Reserve Bank had failed to determine the "buying rate for cable transfers" in a manner directed by Federal statute, and commenced an article 78 proceeding to compel the Federal Reserve Bank to make its determination in the manner provided by law. In affirming a dismissal of the petition on the ground that there was no subject matter jurisdiction, Chief Judge Lehman, writing for the court, acknowledged that many cases could be cited to "sustain the power of a state court acting within the field of its allotted jurisdiction, to enforce rights created by federal statute and to remedy wrongs committed by federal officers under color of authority granted by federal statutes" but observed that "[n]o case has been cited which holds that a state court may go outside that field and control the manner in which a federal agency performs or attempts to perform its functions and duties under the Tariff Act or other federal statute where the Federal government has exclusive jurisdiction." (286 NY at pp 508-509.) While that case might be distinguished from the one before us because of the attempt there to have the state court review directly an action of a Federal officer, subsequent decisions in which reliance was placed upon the rationale of *Schmoll* are more apposite. For example, *Wasservogel v. Meyerowitz* (300 NY 125) involved four summary proceedings to evict tenants for nonpayment of rent. The tenants resisted eviction upon the ground that retroactive rent increases allowed by orders of the Federal Office of Rent Control were improper. This court, in holding that the landlords were entitled to the relief which they sought, noted that "the laws of this State, under the *Schmoll* case and its predecessors, is and was that our state courts have no jurisdiction to review Federal administration orders." (300 NY at p. 134.) There, the tenants also asserted that, unlike

the importer in *Schmoll*, they had no other forum in which to challenge the Federal agency action, claiming that the rent increase must be contested in the state courts or not at all. Significantly, the court did not find that the absence of other review overcame the lack of subject matter jurisdiction, stating that "[t]he courts of this state have never afforded, and do not now afford, any such remedies, whatever the result may be as to preventing suitors from reviewing the acts of Federal officers or agencies." (*Id.*, at p. 134.)

Fieger v. Glen Oaks Vil. (309 NY 527) involved the same Federal agency, the FHA, as in the case now before us. In *Fieger*, certain tenants complained that their landlords, by committing various kinds of wrongs, were able to procure the FHA to insure mortgage loans in excessive amounts, with the result that the rent schedules approved by FHA authorities for these tenants were greatly in excess of reasonable rentals. In affirming a dismissal of the complaint, this court stated that, even assuming that the FHA's statutory power to fix maximum rents was for the benefit of tenants, under *Schmoll* and *Wasservogel* the state courts had no power to review the FHA determination for the reason that "[s]uch a determination of the F.H.A. authorities represents Federal governmental action by authorized Federal officers" (*id.*, at p. 533).

This is not to say that in every case where Federal administrative action is in some way involved the state courts are deprived of subject matter jurisdiction. For example, in *Northridge Cooperative Section No. 1 v. 32nd Ave. Const. Corp.* (2 NY2d 514), actions were brought by cooperative corporations after their control had been acquired by tenant-owners, against officers and directors who had held office when the lands were acquired and the buildings

constructed. The tenants alleged various acts of misconduct by the former officers and directors, such as erecting the cooperative apartment house upon land leased at excessive ground rental from another corporation owned and controlled by themselves, letting building contracts at excessive cost to corporations likewise owned and controlled by themselves, altering the plans and specifications while the work was in progress so as to cheapen the apartments which the tenants had contracted to acquire, and other breaches of trust. This court rejected the defendants' contention that FHA approval of the lo[illegible] on the cooperative apartment house gave plenary absolution to whatever breaches of fiduciary obligation may have been committed. Instead the court held that the scope of the FHA's function in this context in no way conflicted with the jurisdiction of the state court which was being invoked, and that the "equitable jurisdiction of the state courts to enforce fiduciary obligations of directors and promoters is interwoven into State corporation law and was not intended to be pre-empted by the National Housing Act." (*Id.*, at pp. 531-532.) Still, the court was careful to point out that the case before it was "not being maintained in derogation of any official act which the Federal Housing Administrator has performed that is binding on these parties." (*id.*, at p. 532).

Although other cases holding that our state courts lack subject matter jurisdiction to review, even in an indirect manner, Federal administrative action could be analyzed at length (e.g., *Franconia Vil. Cooperative v. Lincoln Sav. Bank of Brooklyn*, 22 AD 2d 402; *Rubel v. Linden Towers Cooperative No. 6*, 39 Misc 2d 620), further argument should not be required to demonstrate that our courts do not have jurisdiction of the subject of this action.

In sum, then, since the prosecution of the lawsuit would necessarily call into question the correctness of the FHA Commissioner's 1964 determination, made under the authority of Federal statute and regulation, our state courts are not empowered to review such authorized Federal determinations. Inasmuch as the plaintiffs did seek FHA assistance in their wage-rate dispute, resulting in a determination by the FHA Commissioner as to their "proper compensation", it is unnecessary to decide whether aggrieved employees who had neither sought nor received an FHA determination would be entitled to maintain a private action by an extension of our rationale in *Filardo v. Foley Bros.* (297 NY 217, revd on other grounds 336 US 281, *supra*).

Accordingly, I would reverse.

Breitel, Ch. J. (dissenting):

In addition to the reasons contained in the dissenting opinion, with which I concur, I conclude that plaintiffs are estopped by their failure to exhaust the federal administrative remedy. Not only had they initiated the federal administrative remedy but they partook of its benefits by accepting additional paychecks obtained through the federal agency.

* * * * * * * *

Order affirmed, with costs, in a memorandum. Question certified answered in the negative. All concur except Jasen, J., who dissents and votes to reverse in an opinion in which Breitel, Ch. J., concurs in a separate dissenting memorandum.

Decided February 26, 1976

1964 CODE OF FEDERAL REGULATIONS
TITLE 29—LABOR

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION

* * *

§5.1 Purpose and scope.

The regulations contained in this part are promulgated in order to coordinate the administration and enforcement of the labor standards provisions of each of the following acts by the Federal agencies responsible for their administration; i.e.:

Davis-Bacon Act (40 U.S.C. 276a-276a-7), and as extended to the Federal-Aid Highway Act of 1956 (23 U.S.C. 113).

Copeland Act (40 U.S.C. 276c).

Contract Work Hours Standards Act (secs. 101-106, 76 Stat. 357-360).

National Housing Act (12 U.S.C. 1701q. 1703, 1708-1711, 1713, 1715a, 1715k, 1715(d)(4), 1715v, 1751w, 1715e, 1716, 1743, 1747, 1748b, 1748h-2, 1750g).

Hospital Survey and Construction Act (42 U.S.C. 291h).

Federal Airport Act (49 U.S.C. 114).

United States Housing Act of 1937 (42 U.S.C. 1416).

Housing Act of 1949 (49 U.S.C. 114).

School Survey and Construction Act of 1950 (20 U.S.C. 636).

Defense Housing and Community Facilities and Services Act of 1951 (42 U.S.C. 1592).

Federal Civil Defense Act of 1950 (50 U.S.C. App. 2281).

Area redevelopment Act (sec. 21, 75 Stat. 61).

Delaware River Basin Compact (sec. 15.1, 75 Stat. 714).

[27 F.R. 10119, Oct. 16, 1962]

* * *

§5.6 Enforcement.

(a) It shall be the responsibility of the Federal agency to ascertain whether the stipulations required by §5.5 have been inserted in the contracts. Agencies which do not directly enter into such contracts shall promulgate the necessary regulations or procedures to requrie that the contracts contain the provisions of §5.5 or such modifications thereof which have been approved by the Department of Labor. No payment, advance, grant, loan or guarantee of funds shall be approved by the Federal agency after the beginning of construction unless there is on file with the agency a certification by the contractor that he and his subcontractors have compiled or that there is an honest dispute with respect to the required provisions.

(b) Whenever any contractor or subcontractor is found by the Secretary of Labor or the Agency Head to be in aggravated or wilful violation of the prevailing wage or overtime pay provisions of any of the applicable statutes listed in §5.1, other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period of three years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as

provided below) to receive any contracts subject to any of the statutes listed in §5.1. In cases arising under contracts covered by the Davis-Bacon Act, the ineligibility provision prescribed in that act shall govern.

The Agency Head shall furnish to the Secretary of Labor for transmittal to the Comptroller General the names of the persons or firms who have been found to have disregarded their obligations to employees. The Comptroller General will distribute a list to all Departments of the Government giving the names of such ineligible persons or firms.

* * *

(d) The Federal agency shall make such examination of the certified payrolls and statements as may be necessary to assure compliance with the labor standards stipulations required by the regulations contained in this part and the applicable statutes listed in §5.1. In connection with such examination particular attention should be given to the correctness of classification and disproportionate employment of laborers, helpers or apprentices. Such payrolls and statements shall be preserved by the agency for a period of three years from the date of completion of the contract and shall be produced at the request of the Secretary of Labor at any time during the 3-year period.

(e) In addition to the examination of payrolls and statements required by paragraph (d) of this section, the Federal agency shall cause investigations to be made as may be necessary to assure compliance with the labor standards stipulations required by the regulations contained in this part and the applicable statutes listed in §5.1.

Projects where the contract is of short duration (6 months or less) shall be investigated before the work is accepted, if feasible. In the case of contracts which extend over a long period of time the investigation shall be made with such frequency as may be necessary to assure compliance. Such investigations shall include interviews with employees and examinations of payroll data to determine the correctness of classifications and disproportionate employment of laborers, helpers or apprentices. Complaints of alleged violations shall be given priority and statements, written or oral, made by an employee shall be treated as confidential and shall not be disclosed to his employer without the consent of the employee.

[16 F.R. 4431, May 12, 1951, as amended at 23 F.R. 9673, Dec. 13, 1958]

§5.7 Reports to the Secretary of Labor.

(a) After completion of investigations, the appropriate Federal agency shall, where the violations are wilful or result in underpayments in the amount of $200 or more, transmit to the Secretary of Labor a report of its findings, including information as to restitution made; payments or approvals of loans, grants, guarantees, or subsidies withheld; contract terminations; the names and addresses of employees and contractors or subcontractors affected. The procedure for the withholding of funds under the Davis-Bacon Act shall be in accordance with the Comptroller General's letter of February 28, 1936. A. 34106, which is appended hereto.

(b) No report need be made to the Secretary of Labor where the underpayments total less than $200, if nonwilful, and the Federal agency has required restitution to be made and has received assurance from the contractor of future compliance.

(c) Upon request, the Agency Head shall transmit to the Secretary of Labor such information available to the Agency with respect to contractors and subcontractors, their contracts, and the nature of the contract work as the Secretary may find necessary to the performance of his duties with respect to the labor standards provisions referred to in this part.

(d) Where the contract is terminated by reason of violations of the labor standards a report shall be submitted to the Secretary of Labor and the Comptroller General giving the name and address of the contractor or subcontractor whose right to proceed has been terminated, the name and address of the contractor or subcontractor, if any, who is to complete the work, the amount and number of his contract, and the description of the work he is to perform.

[16 F.R. 4432, May 12, 1951,, as amended at 17 F.R. 11593, Dec. 19, 1952].

* * *

§5.8 Suspension of funds.

In the event of failure or refusal of the contractor or any subcontractor to comply with labor standards stipulations required by the regulations contained in this part and the applicable statutes listed in §5.1, the Federal agency shall take such action as may be necessary to cause the suspension of the payment, advance or guarantee of funds until such time as the violations are discontinued or until sufficient funds are withheld to compensate employees for the wages to which they are entitled.

[16 F.R. 4432, May 12, 1951]

§5.9 Restitution.

(a) The Agency Head may, in appropriate cases where violations of the labor standards stipulations required by

the regulations contained in this part and the applicable statutes listed in §5.1 resulting in underpayment of wages to employees are found to be nonwilful, order that restitution be made to such employees.

(b) In cases where the Agency Head finds substantial evidence that such violations are wilful and in violation of a criminal statute, the Agency Head shall forward the matter to the Attorney General of the United States for prosecution in the facts warrant. In all such cases the Secretary of Labor shall be informed of the action taken.

[16 F.R. 4432, May 12, 1951]

§5.10 Department of Labor investigations.

(a) The Secretary shall cause to be made such investigations as he deems necessary, in order to obtain compliance with the labor standards provisions of the applicable statutes listed in §5.1, or to affirm or reject the recommendations by the Head of an agency for an appropriate adjustment in liquidated damages assessed under the Contract Work Hours Standards Act. Federal agencies, contractors, subcontractors, sponsors, applicants or owners shall cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all other aspects of the investigation. Any authorized representative of the Department of Labor under this section is deemed a person designated to aid in the enforcement of the overtime standards required by the Contract Work Hours Standards Act within the meaning of section 104(a) of that Act. A report of the investigation of such representative shall be transmitted to proper officers of the United States, any territory or possession, as the case may be, as required by the aforesaid section 104(a).

(b) In the event of disputes concerning the payment of

prevailing wage rates or proper classifications which involve significant sums of money, large groups of employees, or novel or unusual situations, the Secretary of Labor may, upon request by a Federal agency, direct a hearing to be held. For the purpose of the hearing the Secretary of Labor shall, in writing, designate a hearing examiner who shall, after notice to all interested parties, make such investigation and conduct such hearings as may be necessary and render a decision embodying his findings and conclusions and if wages are found to be due, the amounts thereof. The hearing examiner's decision shall be sent to the interested parties and shall be final unless a petition for review of the decision by the Secretary of Labor is filed by any such parties in quadruplicate with the Chief Hearing Examiner, United States Department of Labor, Washington 25, D.C., within 20 days after receipt thereof. The petition for review must set out separately and particularly each objection asserted. The petition for review and the record which shall include the examiner's decision then shall be certified by the hearing examiner to the Secretary of Labor. The petitioner may file a brief (original and four copies) in support of this petition within the 20-day period and any interested party upon whom the hearing examiner's decision has been served may within 10 days after the expiration of the time for filing the petition for review, file a brief in support of, or in opposition to the hearing examiner's decision. The Secretary of Labor's decision shall be final.

[27 F.R. 10120, Oct. 16, 1962, as amended at 28 F.R. 547, Jan. 22, 1963].

§ 5.11 Rulings and interpretations.

All questions arising in any agency relating to the application and interpretation of the regulations contained in

this part and of the Davis-Bacon Act, as amended, and as extended to the labor standards provisions of the Federal-Aid Highway Act of 1956, of the Copeland and Anti-Kickback Acts, as amended, of the Eight-Hour Laws, as amended, and of the labor standards provisions of the following acts, the National Housing Act, as amended, the Housing Act of 1949, as amended, the Hospital Survey and Construction Act, the Federal Airport Act as amended, the School Survey and Construction Act of 1950, the Defense Housing and Community Facilities and Services Act of 1951, as amended, and the Federal Civil Defense Act of 1950, as amended, shall be referred to the Secretary of Labor for appropriate ruling or interpretation. The rulings and interpretations of the Secretary shall be authoritative and may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947. Requests for such rulings and interpretations should be addressed to the Secretary of Labor, United States Department of Labor, Washington 25, D.C.

[23 F.R. 9673, Dec. 13, 1958]

* * *